Supreme Court, U. S.
FILED
MAY 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1885

DAVID LAW AND JAMES YARBROUGH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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May 29, 1980.

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IN THE

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No.

DAVID LAW AND JAMES YARBROUGH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners, David Law and James Yarbrough, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on December 21, 1979.

OPINION BELOW.

The opinion of the Court of Appeals was an "Unpublished Per Curiam Order" and it together with that Court's judgment appear as Appendix A hereto.

JURISDICTION.

Petitioners were indicted in a two count indictment. Count I charged Law with embezzling the assets of a labor organization

under 29 U. S. C. § 501(c) and Count II charged Yarbrough of being an accessory after the fact under 18 U. S. C. § 3. They were convicted on May 2, 1979 and sentenced on June 14, 1979. The Court of Appeals affirmed on December 21, 1979 and denied rehearing on April 29, 1980.[1] This petition for writ of certiorari is filed on or before May 29, 1980.

Jurisdiction is vested under 28 U. S. C. 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1.

Whether the indictment stating nothing more than the substance of 29 U. S. C. § 501(c) and 18 U. S. C. § 3 violated Petitioners' rights under the Sixth Amendment to the Constitution of the United States and Rule 7(c)(1) of the Federal Rules of Criminal Procedure?

2.

If so, whether the defective indictment can be cured by a Bill of Particulars without violating Petitioners' rights to be indicted by a grand jury under the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

UNITED STATES CONSTITUTION, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ., nor be deprived of life, liberty or property, without due process of law; . . .

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1. The Order denying rehearing is Appendix B hereto.

UNITED STATES CONSTITUTION, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation;

FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 7(c)(1):

> The indictment or the information shall be plain, concise and definite statement of the essential facts constituting the offense charged. . . .

TITLE 29, Section 501(c), UNITED STATES CODE:

> Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than 5 years, or both.

TITLE 18, Section 3, UNITED STATES CODE:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment is an accessory after the fact. . . .

STATEMENT OF THE CASE.

1.

The Pleadings.

In pertinent part the indictment charged as follows:

> COUNT I
>
> That on or about May, 1976 . . . DAVID LAW while an officer, that is Publicity and Education Chairman of United Autoworkers Local 974 . . . did embezzle, steal and unlawfully and wilfully abstract and convert to his own use and the use of another the monies, funds, securities, property and other assets of said labor organization in an amount exceeding $1,000; in violation of Title 29, Section 501(c), United States Code.
>
> COUNT II
>
> That on or about May, 1976 . . . JAMES YARBROUGH, knowing that an offense against the United States had been committed, that is, a violation of Section 501(c), Title 29, United States Code, did receive, relieve, comfort and assist the offender, DAVID LAW, in order to hinder or prevent his apprehension, trial and punishment; in violation of Section 1, Title 18, United States Code.

Petitioners moved to dismiss the indictment on grounds that it failed to inform them of the nature of the charge against them in violation of the Fifth and Sixth Amendments to the Constitution of the United States and Rule 7(c)(1) of the Federal Rules of Criminal Procedure [Motion to Dismiss, pars. 1, 4 & 5]. In response the Government filed a bill of particulars which stated in full as follows:

> 1. Count I of the Indictment refers to a trip to London, England, ostensibly for an IMF Conference.
>
> 2. At an Executive Board meeting of U.A.W. Local 974, held in March 1976, David Law advised the Executive Board that such a conference was being held and that

Robert Johnston, Region IV Director, United Auto Workers, requested that Local 974 send a delegation.

3. That at such meeting, the Executive Board of Local 974 authorized a delegation to attend.

4. That in May, 1976, the authorized delegation from U.A.W. Local 974 consisting of David Law, James Yarbrough, L. R. Brown, Wayne Schmidt, James B. O'Connor and Curt Martin left Peoria, Illinois and arrived in London, England.

5. That no such I.M.F. Conference was held in London, England during May, 1976.

6. That David Law's representations of such were a ruse to enable Mr. Law to vacation in England at Local 974 expense.

7. That while in London, James Yarbrough learned that the trip was not legitimate and, thereafter, endeavored to conceal this fact from Local 974.[2]

8. That James Yarbrough further took steps to make the trip appear to be legitimate.[2]

9. That the expenses for each of the delegates, including travel, meals, lodging, lost time and other incidental expenses were paid from funds maintained by U.A.W. Local 974.

Despite their protestations that a bill of particulars could not be used to cure defective indictments, the District Court denied Petitioners' motion to dismiss. [TR. of 4/20/79].

2.

The Facts.

The facts are essentially undisputed as most of them were established by documentary evidence and the Government's own witnesses. In summary, they are as follows:

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2. In the words of the court below: "After returning from London delegation members were given checks for wages lost while they were in London, Yarbrough as financial secretary of the local, signed the checks." [APP. 2]. But the Government's own evidence

(Footnote continued on next page.)

1. On March 23, 1976, Robert Johnston, as Director of UAW Region 4, wrote Local 974 concerning a trip to London to "meet with British trade union and government leaders" and suggested that a Local delegation be authorized to attend. [Defendants' Ex. 2, TR. 90, 106-107].

2. UAW Region 4 and Director Johnston were to arrange for the "meet(ings) with British trade union and government leaders." [TR. 80, 88, 92, 93 & 108].

3. On March 29, 1976, Petitioner Law made a motion that Local 974 authorize a 6 man delegation to attend the meetings and said motion was unanimously adopted by the Local's Executive Board. [Bill of Particulars, par. 3].

4. Neither Robert Johnston nor UAW Region 4 arranged for the meetings and did not notify Local 974 that the arrangements had not been made. [TR. 80, 87, 88, 92, 93 & 108].

5. On May 7, 1976, the Local's delegation left Peoria and while at O'Hare Airport enroute to London, Petitioner Law called UAW Region 4 and learned for the first time that no meetings had been scheduled. [TR. 245-246].[3]

6. After arriving in London, Petitioner Law arranged for a meeting with representative of Transport General Workers Union which was held on Friday, May 15, 1976. [TR. 248-252].

(Footnote continued from preceding page.)

established that the financial secretary had no power in this regard and that he was required to issue the checks as a matter-of-course after approval of the expenditures by the Executive Board. [TR. 74-76].

3. There is a factual dispute concerning this event. Law testified that Region 4 gave him the names of British labor leaders and told him to proceed as planned and set up some meetings upon arrival in London. Johnston testified that he didn't remember any such phone call and other members of the Local 974 delegation testified that Law did not tell them that no meetings had been planned until after they got to London.

7. After returning home each trip participant submitted a voucher for expenses which were approved by Local 974 Executive Board and paid by check bearing the signature or facsimile signature of Petitioner Yarbrough. [TR. 74-76].

3.

Proceedings Below.

At the trial the Government shifted its position back and forth between the claim that Law's motion of March 29, 1976 constituted "a ruse to enable Mr. Law to vacation in England at Local 974 expense" and the claim that the trip should have been aborted when Law was at O'Hare airport and learned that no meetings had been arranged. There is no way of knowing but based on the undisputed evidence and the court's instructions it is more than likely that Petitioners' convictions were based on the failure to abort the trip.

In the Court of Appeals the Government took the position that "Law lied to the executive board of Local 974" on March 29, 1976 and that court found that the "evidence would have allowed a jury to conclude that *Law's false presentation of the facts at the March 29 meeting* and eventual trip to London were part of a plan by Law to obtain a trip to London on union expense." [APP. 4 (emphasis added)].

With regard to the indictment, the court below found that it "could have presented more details" but that "it was not so insufficient that the (Petitioners) were unaware of the incidents referred to or that they were unable to adequately prepare their defense." [APP. 5].[4]

---

4. Under the circumstances a defense to the claim that "Law lied to the executive board" on March 29, 1976 was vastly different than defending against the contention that the trip should have been aborted on May 7, 1976. Moreover, the convictions rest on some kind of criminal fraud and even Rule 9(b) of the Federal Rules of Civil Procedure requires that "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity."

REASONS FOR GRANTING THE WRIT.

Opinion Below Conflicts with the Decisions of the Supreme Court of the United States.

The Sixth Amendment to the Constitution of the United States provides that "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation" and in pertinent part Rule 7(c)(c) of Federal Rules of Criminal Procedure prescribes that "The indictment . . . shall be *a plain, concise and definite written statement of the essential facts* constituting the offense charged." [Emphasis added].

As this Court declared in *Russell* v. *United States,* 369 U. S. 749, 764 (1961): "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute". And as stated as far back as 1876 in *United States* v. *Cruickshank,* 92 U. S. 542, 558:

> In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' [Citation]. In U.S. v. Mills 7 Pet. 142 this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged' and in U.S. v. Cook, 17 Wall 174, that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense whether it be at common law or by statute 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' (Citation). * * * * For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

In *Hamling* v. *United States*, 418 U. S. 87 (1974) an indictment charging obscenity in the language of the statute was upheld because "The definition of obscenity, however is not a question of fact, but one of law." [418 U. S. at 118] but the underlying principle remained the same, *viz.:*

> It is generally sufficient that an indictment set forth the offence in the words of the statute itself, as long as 'those words of themselves fully, directly and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' United States v. Carle, 105 U.S. 611, 612 (1882). 'Undoubtedly the language of the statute may be used in the general description of an offence, *but it must be accompanied with such a statement of the facts and circumstances as will inform the accused* of the specific offense coming under the general description, with which he is charged.' United States v. Hess, 124 U.S. 483, 487 (1888) [425 U.S. at 117-118 (Emphasis added)].

Unlike the obscenity statute in *Hamling, supra,* the crimes defined by 29 U. S. C. § 501(c) and 18 U. S. C. § 3 are not questions of law and guilt thereunder "depends so crucially upon . . . *a specific identification of fact.*" [*Russell* v. *United States,* 369 U. S. at 764]. This is evident on the face of the opinion of the court below. Quoting from *United States* v. *Debrizzi,* 393 F. 2d 642, 645 (2d Cir., 1978) the 7th Circuit states that "the reach of § 501(c) is not limited to union officers who engage in stealthy larcenies or devious embezzlements but extends to an officer who 'unlawfully and wilfully abstracts or converts to his own use' the funds of a labor organization."[5]

In holding that "The indictment here notified the Appellants of the charges they faced and gave the approximate time the alleged criminal activity occurred" [APP. 5], the Court of

5. Here, the moneys were expended at various times in various ways. A non-refundable payment of $2,872 was made to the Chicago travel agency on April 8, 1976, advance expenses of $389 were paid to each of the 6 participants on May 4, 1976 and lost time and other expenses totalling $2,319 were paid to the 6 participants after the trip was over. [Govt's Exs. 1-7].

Appeals necessarily had to rely on the Government's bill of particulars as the indictment doesn't even suggest that the charges involved a trip to London. Thus, the question that emerges is whether a fatally defective indictment can be cured by a bill of particulars consistent with the Fifth Amendment's command that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury".

The rule is clearly stated in *Russell* v. *United States*, 369 U. S. 749, 770-771 (1962) as follows:

> It is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment. (Citations omitted). * * * To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even, presented to the grand jury which indicted him. (Citation omitted).
>
> '* * * Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment in reality no longer exists.' Ex parte Bain, supra (121 U.S. at 10, 13).

The Court of Appeals apparently recognized the problem when it observed that "A reading of some of the testimony presented to the grand jury indicates that all of the elements of the embezzling were presented to and considered by the grand

jury". But the question does not focus on what the grand jury had before it. Rather the question must focus on what the grand jury charged by its indictment. By limiting the time of the criminal acts to "May, 1976" it seems clear that the grand jury's view of the offense was the failure to abort the trip on May 7, 1976, rather than the fact that Petitioner Law "lied to the Executive Board on March 29, 1976". Yet both Petitioners stand convicted because the court below has here held that "the jury could have concluded that at this time (3/29/76) Law was misrepresenting the facts to the Board in order to secure a trip to London at union expense." [APP. 4].

Furthermore, neither the indictment, the bill of particulars, the evidence nor the opinion below has yet made clear the nature of the charges against Petitioner Yarbrough or the factual basis of his conviction.

CONCLUSION.

For the foregoing reasons and for others implicit therein a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued December 11, 1979)

December 21, 1979.

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Philip W. Tone, *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

United States of America, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division.
Nos. 79-1666 and 79-1667 *vs.*	
David Law and James Yarbrough, *Defendants-Appellants.*	No. 79-Cr-10013
	Robert D. Morgan, *Judge.*

ORDER

David Law and James Yarbrough appeal from judgment of conviction and sentence entered in the district court. Law was convicted of embezzling the assets of a labor organization, 29 U. S. C. § 501(c), while Yarbrough was convicted of being an accessory after the fact. 18 U. S. C. § 3. Law and Yarbrough were sentenced to two years and fined $2000 with the first sixty days of the sentence to be served in a jail-type institution and

the remainder of the confinement to be suspended. At the end of the sixty days, the appellants were to be placed on three years probation.

The appellants raise several challenges to their convictions. Law argues that authorization by the union of the expenditures at issue placed his conduct outside the scope of § 501(c). Both Law and Yarbrough contend that the evidence was insufficient to support the verdicts of guilty and that the indictments were defective. We find these contentions without merit and affirm the convictions.

I. Facts

The embezzling concerned a trip to London at union expense by members of the U. A. W. Local 794 in May, 1976. The trip was a result of a proposal by Law at a meeting of the Executive Board of Local 974 held on March 29, 1976. Law, the publicity director for the local, told the Board that he had just received a call from Robert Johnston, Region IV Director of the U. A. W., and that Johnston wanted Local 974 to send a group to an I. M. F. Conference in London during May, 1976. Law stated that the delegation was to consist of four full-time officers and two other members of the Executive Board. The Board voted to send a delegation, and Law and Yarbrough were two of its members.[1]

Upon their arrival in London, two of the delegation members asked Law about the Conference. Law responded that he was going to Scotland and would speak to them upon his return. Law also stated that there was no agenda for the trip.

In London, a delegation member spoke to Yarbrough about the absence of meetings. Yarbrough responded "Just everybody

1. Prior to the meeting, Johnston had sent a letter to Local 974 proposing some kind of trip to London. However, it appears that Law was not aware of this letter. Johnston did not recall a conversation with Law on March 29. Also, Johnston testified that the trip, as far as he knew, never got past the initial proposal contained in his letter.

better keep quiet or it's political suicide if it gets out if we get back home. Keep quiet or we'll all go to jail."

There was no labor conference in London and the only union related activity was a short meeting held with a British labor leader. After returning from London delegation members were given checks for wages lost while they were in London. Yarbrough, as financial secretary of the local, signed the checks.

II. Union Authorization

Law argues that the Board's approval of the trip under proper union procedures places his conduct out of the scope of § 501(c).[2]

The mere fact of union authorization cannot absolve a defendant from a violation of § 501(c). *United States* v. *Capanegro,* 576 F. 2d 973 (2d Cir. 1978); *United States* v. *Vitale,* 489 F. 2d 1367 (6th Cir. 1974).

> Even if appellant may have established that his expenses were, as he claims, authorized and adopted by the union, such does not absolve him of his crimes; the reach of § 501(c) is not limited to union officers who engage in stealthy larcenies or devious embezzlements but extends to an officer who "unlawfully and wilfully abstracts or converts to his own use" the funds of a labor organization. When one sends the union a voucher known to be an im-

2. In making this argument, Law relies on *United States* v. *Silverman,* 430 F. 2d 106 (2d Cir. 1970), *cert. denied,* 402 U. S. 953 (1971) and *United States* v. *Ottley,* 509 F. 2d 667 (2d Cir. 1975). Neither of these cases supports the proposition. The statement the appellants cite from *Silverman* is *dictum.* Also, the court in *Silverman* emphasized the necessity of a bona fide belief that the payment was for a union benefit. Thus, even if there is union authorization, the process of obtaining the authorization must be supported by a good faith belief.

The court in *Ottley* rejected an argument similar to that set forth by Law in this case. *Ottley* discussed the defendant's good faith belief and union authorization. The court noted that the issue of intent could not be narrowed solely to whether the expenditure of union funds was authorized.

> proper one, and then receives payment of the voucher, the crime is completed.

United States v. *Dibrizzi,* 393 F. 2d 642, 645 (2d Cir. 1968).[3]

III. Sufficiency of the Evidence

The appellants contend that the evidence was insufficient to support a verdict of guilty. Of course, we must view the evidence in the light most favorable to the government. *Glasser* v. *United States,* 315 U. S. 60 (1942).

There was sufficient evidence to support the verdict against Law. There was testimony that Law, at the March 29 meeting, told the Board that he had been on the phone with Johnston who told him to act quickly on the trip to London. Also, Law stated that Johnston wanted four full-time officers to go on the trip. Johnston testified that he did not recall talking to Law and that he would not have instructed Law what members to go on the trip. Thus, the jury could have concluded that at this time Law was misrepresenting the facts to the Board in order to secure a trip to London at union expense.

There was testimony that no arrangements or meetings for a labor conference were ever scheduled before the departure to London. The jury was free not to believe the testimony of Law that up to the time of departure he honestly believed that the trip was not cancelled. Likewise, the jury was free to believe the testimony of Johnston that he did not recall a phone call from Law before the group departed for London in which Law was allegedly told to go ahead with the trip. Other witnesses testified that Law did not inform them of the absence of any agenda until their arrival in London.

All of this evidence would have allowed a jury to conclude that Law's false presentation of the facts at the March 29 meet-

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3. Yarbrough argues that since Law could not have violated § 501(c) Yarbrough could not have been an accessory after the fact. Our holding that Law's conduct fell within the coverage of § 501(c) compels us also to reject Yarbrough's contention.

ing and eventual trip to London were part of a plan by Law to obtain a trip to London on union expense.

The verdict against Yarbrough as an accessory after the fact is also supported by the evidence. There was testimony that when Yarbrough discovered that there was no labor conference in London, he said, "Just everybody better keep quiet or it's political suicide if it gets out if we get back home. Keep quiet or we'll all go to jail." This statement clearly indicates that Yarbrough realized that the expenditure of union funds to pay for the trip was illegal.

The government presented evidence that Yarbrough, upon returning from London, signed checks for lost wages for some of the union members. The initial letter from Johnston describing the trip to London stated that "No lost time can be paid." It was the government's theory that Yarbrough realized that the trip was illegal and upon returning paid for lost wages to insure that the members would not tell about the impropriety of the trip.

Yarbrough's statement made in London in conjunction with his approval of lost wages could have allowed the jury to infer that Yarbrough sought to cover up the illegal trip. The payments also must be considered in light of Johnston's letter prohibiting such payments. Certainly, the evidence of cover-up is circumstantial and there might have been other inferences to be drawn from Yarbrough's signing of the checks. However, this was for the jury to decide.

IV. Sufficiency of the Indictment

The appellants contend that the indictment was insufficient.[4] This insufficiency, they argue, violated the Sixth Amendment right to be informed of the charge, the Fifth Amendment right to be indicted by a grand jury, and Fed. R. Crim. P. 7(c)(1).

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4. After the indictment was handed down the government filed a bill of particulars.

It is clear that the indictment can be phrased in the language of the applicable statute. *United States* v. *Matthews,* 572 F. 2d 208 (9th Cir. 1977). In the present case, the indictment states that the criminal activity occurred "on or about May, 1976." Also, the count against Law referred to the office he held in the union. Thereafter, the indictment tracked the language of the particular statutes.

An indictment is sufficient if it performs two functions—gives notice to the defendant so that a proper defense can be prepared and enables the defendant to plead the acquittal or conviction as a bar to future prosecution for the same offense. *Hamling* v. *United States,* 418 U. S. 87, 117 (1974). The indictment here notified the appellants of the charges they faced and gave the approximate time the alleged criminal activity occurred. While the indictment could have presented more details, it was not so insufficient that the appellants were unaware of the incidents referred to or that they were unable to adequately prepare their defense. *United States* v. *Haldeman,* 559 F. 2d 31, 124 (D. C. Cir. 1976) (en banc), *cert. denied,* 431 U. S. 933 (1977).[5]

Likewise, the indictment was sufficient to plead the subsequent judgment of conviction as a bar to double jeopardy. The indictment in this case alleged activities which occurred in May, 1976. This is the time the appellants went on the trip at the expense of the union and when Yarbrough signed the checks. The trip was the culmination of the events which were initiated by Law at the Board meeting of March 29, 1976. Proof at trial demonstrated this sequence of events. The allegation in

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5. *Russell* v. *United States,* 369 U. S. 749 (1962) is distinguishable. *Russell* concerned a statute which made it a crime for a witness before a congressional committee to refuse to answer questions pertinent to the subject under inquiry. The Court held the indictments defective for failure to specify the subject of the inquiry. The Court in *Russell* emphasized the peculiar need for specificity where guilt depended on such a specific identification of fact. The crime involved in this case does not turn on such a particular fact. *See also Hamling* v. *United States,* 418 U. S. at 118.

the indictment concerning the events of May impliedly referred to other actions taken by Law. Also, the transcript and record could be utilized to show the nature of the proof at trial.[6]

The appellants' claim that the insufficiency of the indictment deprived them of the right to be indicted by a grand jury is without merit. A reading of some of the testimony presented to the grand jury indicates that all of the elements of the embezzling were presented to and considered by the grand jury. Likewise, the evidence produced at trial and theory of the crime relied upon were all "fairly embraced" within the charges in the indictment. *United States* v. *Silverman,* 430 F. 2d 106 (2d Cir. 1970). *United States* v. *Brozyna,* 571 F. 2d 742 (2d Cir. 1978).

V. Variance

The appellants argue that the crime charged in the indictment and bill of particulars varied from the proof at trial. This argument is without merit.

First, it is clear that while the indictment does refer to the events of May, 1976, the meeting of March 29, was part of the *United States* v. *Haldeman, id.* at 126.[7]

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6. Law does not explicitly state the harm suffered by the alleged insufficiency of the indictment. His argument appears to imply that the indictment referred to activities in May but proof at trial was on the meeting of March 29, thus possibly leaving him subject to another prosecution. It is clear, however, that the embezzling culminated upon the trip being taken. Any future attempt to indict Law alleging the meeting of March 29 would be barred by double jeopardy. *Cf. Harris* v. *Oklahoma,* 433 U. S. 682 (1977).

7. The failure of the indictment to allege the manner in which Yarbrough was an accessory does not render it insufficient. *Cf. United States* v. *Garrison,* 527 F. 2d 998 (8th Cir. 1975) (indictment need not allege acts of aiding and abetting).

Also, we find no violation of Fed. R. Crim. P. 7(c)(1). As we note above, the indictment must merely state the essential elements of the offense. *United States* v. *Haldeman,* 559 F. 2d at 124 (D. C. Cir. 1976). Rule 7 does not suggest that the government must inform the defendant of the particular means by which the prosecution will prove its case. The rule merely was designed to eliminate technical forms of pleading.

entire scheme which culminated in the trip. The offense alleged in the indictment was the same offense proven at trial—taking a trip to London at union expense. To be sure, the indictment did not refer to the meeting of March 29. Yet this was insignificant. The meeting was part of the entire scheme and was fairly embraced within the terms of the indictment.

For variance to require reversal substantial rights must be affected. *United States* v. *Lindsey*, 602 F. 2d 785 (7th Cir. 1979). The appellants make no effort to allege the harm or prejudice suffered by the claimed variance. Rather they make only conclusory statements that they were "misled" or not given notice. But as was stated above, the appellants were able to prepare for trial and present their case. Likewise, there was no variance so that the danger of a subsequent prosecution might occur. *United States* v. *Craig*, 573 F. 2d 513 (7th Cir. 1978).

The judgment of the district court is affirmed.

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 21, 1979

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Philip W. Tone, *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

United States of America,
Plaintiff-Appellee,

Nos. 79-1666 and 79-1667

vs.

David Law and James Yarbrough,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Illinois, Peoria Division.

No. 79-CR-10013

Robert D. Morgan, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Peoria Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 29, 1980

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Philip W. Tone, *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

United States of America,
Plaintiff-Appellee,

Nos. 79-1666 and 79-1667

vs.

David Law and James Yarbrough,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Illinois, Peoria Division.

No. 79-CR-10013

Robert D. Morgan, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellants, all of the judges on the original panel having voted to deny the same,

It Is Hereby Ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.